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No. 81-16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

EARLINE CALDWELL, *et al.*,
Petitioners,

v.

THE STATE OF MISSOURI, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENTS CITY OF ST. LOUIS AND JANICE ADAMS, ET AL., IN SUPPORT OF PETITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, under 42 U.S.C. §1988 and Rule 39, F.R.A.P., attorney's fees of an arguably prevailing party for appellate services are items of "costs" to be disposed of as part of an appellate court's general award of costs on appeal?

2. Whether a court of appeals, under 42 U.S.C. §1988, may summarily grant or deny attorney's fees for services on the appeal to an arguably prevailing party?

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BRIEF FOR RESPONDENTS CITY OF ST. LOUIS AND JANICE ADAMS, ET AL., IN SUPPORT OF PETITION

STATEMENT OF THE CASE

Two parties below, the City of St. Louis and Janice Adams, et al., have joined in this brief. These Respondents have no disagreement with the statement of the case presented by Petitioners, as supplemented by the statement in the brief of Respondents Board of Education of the City of St. Louis, et al.

For convenience, and because only the City of St. Louis has been expressly directed to file a brief in response in the instant case (No. 81-16), the following discussion will refer only to Respondent City, but Adams, et al. concur in the views expressed herein.

REASONS FOR GRANTING THE WRIT

1. THE WRIT SHOULD BE GRANTED BECAUSE THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL PRACTICE AND PROCEDURE UNDER 42 U.S.C. §1988, WHICH OUGHT TO BE SETTLED BY THIS COURT.

Respondent City believes that the petition for writ of certiorari in this case actually presents two significant questions: first, whether attorney's fees for appellate services, claimed under 42 U.S.C. §1988, can properly be treated as items of costs under the rules of appellate procedure (and, inferentially, under other rules of civil procedure); and, second, whether it is within the province of an appellate court to summarily award or deny such fees. Because Respondent City believes that there are special and important reasons why these questions should be fully considered by this Court, see S.Ct. Rule 17.1, the City is constrained to support the petition in this instance.[1] Of course, in supporting plenary consideration of the questions presented by the petition, Respondent City is not to be understood as supporting Petitioners' right ultimately to recover the fees claimed by them. Indeed, the fact that there is room for dispute as to whether Petitioners "prevailed" on appeal below provides an additional illustration of the impropriety of summary appellate disposition of such claims for fees.

Both 42 U.S.C. §1988 and its Title VII counterpart, 42 U.S.C. §2000e-5(k), have created considerable confusion by providing for an award of attorney's fees to prevailing parties "as part of the costs." In *Roadway Express, Inc.* v. *Piper*, 447

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[1] Respondent City notes the pendency of another petition for certiorari, in No. 80-2152, arising out of the same judgment of the Court of Appeals. The City has previously waived its right to file a responsive brief in No. 80-2152, and, as previously stated, files this brief at the express direction of the Court.

U.S. 752 (1980), this Court expressed the view that, for purposes of 28 U.S.C. §§1920 and 1927, attorney's fees could not be regarded as "costs". In so doing, this Court rejected the notion that 42 U.S.C. §§1988 and 2000e-5(k) affected the meaning of the word "costs" in the former statutes which form part of the judicial code. However, in *Hutto* v. *Finney*, 437 U.S. 678 (1978), this Court placed great emphasis on the "costs" language of §1988 as permitting an award of fees against officers of a State, payable out of State funds. Because §1988 provided for an award of fees "as part of the costs," and "[c]osts have traditionally been awarded without regard for the States' Eleventh Amendment immunity," it followed that §1988 authorized the award of such fees in *Hutto*, notwithstanding the Eleventh Amendment. 437 U.S. 695. Ironically, part of the award at issue in *Hutto* was a sum for appellate services apparently awarded *sua sponte* by the Court of Appeals for the Eighth Circuit, *id.* at 693; see 548 F.2d 743; but this was not the subject of review.

In light of *Hutto*, it is not surprising that many federal courts have been led to regard the award of attorney's fees as "costs" for purposes of the rules of procedure. Compare *White* v. *New Hampshire Dept. of Employment Security*, 629 F.2d 697 (1st Cir. 1980) (cert. pending, No. 80-5887) with *Knighton* v. *Watkins*, 616 F.2d 795 (5th Cir. 1980).[2] Here, the Court of Appeals apparently acted on the notion that fees for appellate services could be disposed of in the same manner as other costs under Rule 39, F.R.A.P. See Petition, 28a, 39a-40a. Yet this action is (not surprisingly) in conflict with that Circuit's own recent pronouncements. See *Obin* v. *District No. 9, I.A.M.*, 651 F.2d 574 (8th Cir. 1981).

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[2] Respondent City assumes that, insofar as the issues raised in the instant case are concerned, 42 U.S.C. §§1988 and 2000e-5(k) are *in pari materia*, and cases construing the one are relevant to construction of the other. Cf. *Hughes* v. *Rowe*, ___ U.S. ___, 101 S.Ct. 173 (1980); *Roadway Express, Inc.* v. *Piper*, *supra*, 447 U.S. 758 at n. 5.

It seems fairly clear that fees for services under 42 U.S.C. §1988 are not "costs" within Rule 39, F.R.A.P., any more than they can be deemed "costs" under 28 U.S.C. §§1920 and 1927 or Rules 54 and 58, F.R.Civ.P.; and such fees certainly should not be summarily granted or denied by an appellate court. "The decision whether to award attorney's fees under 42 U.S.C. §1988 is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation." *Hughes* v. *Rowe, supra,* 101 S.Ct. at 183 (Rehnquist, J., dissenting). Grant or denial of fees by district courts nearly always requires an evidentiary hearing and detailed findings, see, e.g., *Mitchell* v. *Mid-Continent Spring Co.,* 583 F.2d 275 (6th Cir. 1978), cert. denied, 441 U.S. 922 (1979); *Prandini* v. *National Tea Co.,* 557 F.2d 1015 (3d Cir. 1978); *Johnson* v. *Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974). A district court which summarily denied fees to a prevailing party plaintiff would almost certainly be reversed. Cf. *Newman* v. *Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). There seems to be no sound reason why these rules do not apply to awards for appellate services, and the need for hearings and findings compels the conclusion that fee awards even for appellate services are not the province of the appellate courts.

Petitioners appear (unwisely) to concede that an appellate court has the power to award (and, *a fortiori,* to deny) fees. Petition at 17. This is by no means clear. In the ordinary case, where the identity of the prevailing party and the extent to which he has prevailed is plain, no harm is done when an appellate court purports to grant such fees, so long as the fixing of the amount is left to the district court. Cf. *Verzosa* v. *Merrill Lynch, etc.,* 589 F.2d 974 (9th Cir. 1978); see also *Harris* v. *City of Fort Myers,* 624 F.2d 1321 (5th Cir. 1980). However, a school desegregation case is not an ordinary case. See *Davis* v. *Bd. of School Commissioners,* 526 F.2d 865 (5th Cir. 1976). In any event, the issue of attorney's fees under 42 U.S.C. §1988 almost always is best left to the district court, regardless of whether the fees are for trial or appellate services, and it seems clear that

Congress did not intend to vest the appellate courts with the discretion to award fees under §1988. See, e.g., *Northcross* v. *Bd. of Ed. of Memphis*, 611 F.2d 624 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980); cf. *Perkins* v. *Standard Oil Co.*, 399 U.S. 222 (1970); *Hughes* v. *Rowe, supra.*

The Court of Appeals' disposition of the fee issue in this case is in stark contrast to its recent pronouncement under 42 U.S.C. §2000e-5(k) that the issue of attorney's fees is a "collateral and independent claim," not subject to procedural rules governing costs as such. *Obin* v. *District No. 9, I.A.M., supra.* The same differences between statutory attorney's fees and "costs" recognized in *Obin* counsel against summary grant or denial of fees for appellate services, by appellate courts. Since all of the circuits have treated this matter inconsistently at best,[1] it is appropriate for this Court to grant the writ of certiorari in this case and provide definitive guidance to the courts of appeals.

2. THE WRIT SHOULD BE GRANTED BECAUSE THE ARBITRARY AND CAPRICIOUS PRACTICE OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT UNDER 42 U.S.C. §1988 AND RELATED STATUTES, EXEMPLIFIED BY ITS DECISION IN THIS CASE, CALLS FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Albeit other courts have exhibited some confusion in their manner of awarding fees under 42 U.S.C. §1988 for appellate services, the court below is unique in its haphazard approach. Indeed, so unpredictable is the Court of Appeals for the Eighth Circuit in such matters that it is difficult to accuse that Court of a departure from "the accepted and usual course of judicial

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[1] See, e.g., *Harris* v. *City of Fort Myers, supra* (appellate fees to be fixed on remand); *Smith* v. *Fletcher*, 559 F.2d 1014 (5th Cir. 1977) (appellate court added fee for appeal, *sua sponte*); *Verzosa* v. *Merrill Lynch, etc., supra*, and cases cited in Petition at 17 notes 10 and 11.

proceedings" (S.Ct. Rule 17.1(a)) in this case. The most cursory examination of the cases reveals that this case epitomizes the accepted and usual course in the Eighth Circuit.

Respondent City is intimately acquainted with the Court of Appeals' practice of summary disposition of fees for appellate services. In *Firefighters Institute* v. *City of St. Louis,* 588 F.2d 235 (8th Cir. 1978), cert. denied, 443 U.S. 904 (1979), the Court of Appeals, while animadverting on the failure of the district court to disclose the basis of *its* fee award, affirmed the award for services at trial and then simply added $4,000 "for attorney's fees for the appeal." 588 F.2d 243. No affidavits or evidentiary materials of any kind relative to fees on appeal were filed by any party. The Court of Appeals' basis for its award remains a mystery. On a subsequent appeal, *idem,* 616 F.2d 250 (8th Cir. 1980), cert. denied, 101 S.Ct. 3079 (1981), nothing at all was said about fees or costs by the Court of Appeals, and the fee issue (including appellate services) was resolved in the district court.

In other cases under 42 U.S.C. §§1988 and 2000e-(k), as Petitioners show (see Petition at 18 notes 12-14), the Court of Appeals approaches fee awards with similar inconsistency. Aside from the cases cited by Petitioners, Respondent City would invite this Court to examine *Herrera* v. *Valentine,* 653 F.2d 1220 (8th Cir. 1981) and *Villanueva* v. *George,* ____ F.2d ____, No. 80-1085 (8th Cir. en banc, Sept. 16, 1981). In *Herrera,* the Court of Appeals proceeded as follows (653 F.2d at 1234):

> The costs of this appeal are taxed to the appellants. The appellee is hereby directed to file an affidavit with this Court within twenty days detailing her attoneys' fees in this appeal. The appellants will have ten days thereafter to respond.

In *Villanueva,* however, the Court simply stated (slip op. at 8):

> The judgment of the district court is affirmed in part and reversed in part, and the matter is remanded to the district court for action consistent with this opinion. Costs will be taxed to appellees, Leininger, Aumend and Buttice.

With regard to fees for appellate services, it is apparent that "the accepted and usual course of judicial proceedings" under 42 U.S.C. §1988 in the Eighth Circuit is sometimes to grant such fees summarily, sometimes to deny such fees summarily, sometimes to solicit evidentiary materials,[4] sometimes to act without evidence, and sometimes to say nothing or refer only to "costs" and let the parties sort the matter out for themselves. Clearly, this situation should not continue. The statute, assuming that it confers discretion on an appellate court to make any award of fees, surely did not confer such discretion unfettered by meaningful standards. In a related context, this Court has noted that invocation of judicial discretion by Congress requires a "principled application of standards" consistent with statutory purposes and not " 'equity [which] varies like the Chancellor's foot.' " *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417 (1975). The manner in which the Court of Appeals for the Eighth Circuit has dealt with fees under 42 U.S.C. §1988 in this case and many others bears little, if any, resemblance to a principled application of standards, and only this Court can fit the lower court's foot with an appropriate shoe.

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[4] See *Adams* v. *United States*, 620 F.2d 1277, 1297 (8th Cir.), cert. denied, 101 S.Ct. 88 (1980) and Brief in Opposition of Respondents Board of Education, Appendix 2.

CONCLUSION

For the foregoing reasons, certiorari should issue to review and correct the decision below, preferably by vacating the Court of Appeals' judgment with instructions that the matter of fees be remanded to the district court.

Respectfully submitted,

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